

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 13-7161(JLL)

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PTT, LLC, a Delaware Limited : TRANSCRIPT OF
Liability Company d/b/a High 5 : PROCEEDINGS
Games, :
 : October 3, 2014
Plaintiff/ :
Counterclaim Defendant, :
 :
-vs- : Newark, New Jersey
 :
GIMMIE GAMES, an entity; DANIEL :
MARKS, an individual; JOSEPH :
MASCI, an individual; BRIAN :
KAVANAGH, an individual; MARKS :
STUDIOS, LLC, an entity; :
ARISTOCRAT TECHNOLOGIES, INC., :
an entity; JOHN SMITH(s) 1-7, :
individuals, and XYZ COMPANIES :
1-7, :
Defendants/ :
Counterclaim Plaintiffs.:
- - - - -X

B E F O R E:

THE HONORABLE JOSE L. LINARES,
UNITED STATES DISTRICT COURT JUDGE

Pursuant to Section 753 Title 28 United States Code, the
following transcript is certified to be an accurate record
as taken stenographically in the above-entitled proceedings.

s/Phyllis T. Lewis, CCR, CRCR

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1 THE CLERK: All rise.

2 THE COURT: Thank you.

3 You may be seated.

4 All right. Counsel, let me just get everyone's
5 appearances on the record before we start. This is in the
6 matter of PTT, LLC doing business as High 5 versus Gimmie
7 Games and other people, so I am going to say "et al." For
8 purposes of the record.

9 Can you enter your appearances on the record,
10 please?

11 MR. SHEIKH: Good morning, your Honor.

12 Khizar Sheikh of Mandelbaum Salsburg, attorneys for
13 PTT, LLC.

14 With me today to my right is Jon Fallon, who is
15 also at Mandelbaum Salsburg, and Michael Saffer.

16 THE COURT: Good morning.

17 MR. MOSKIN: Good morning, your Honor.

18 My name is Jonathan Moskin of the firm of Foley &
19 Lardner. With me at counsel table is my colleague, Ramy
20 Hanna.

21 I do want to note, because I don't want to
22 interrupt the plaintiff's submission, I do have some concern
23 that, as your Honor can see, there is a slide presentation,
24 which I gather is some 64 slides together with some internet
25 links that I take it that plaintiff would like to show

1 something from the internet. My guess is that -- well, let
2 me just say it this way: To the extent that this goes
3 beyond anything in their papers, I want to note an objection
4 at the outset, so that I don't have to interrupt.

5 The law is quite clear that even if they had
6 requested leave to file a reply brief, which they didn't,
7 they can't go beyond what is in their moving papers as far
8 as evidence presented to the Court. One of the cases that
9 we cited to your Honor in our own moving papers --

10 THE COURT: Counsel, hang on a second.

11 Are you going to be going over stuff that is not
12 included in your papers?

13 MR. SHEIKH: Well, your Honor, we did request a
14 reply brief. That request was denied, and so anything that
15 we are showing today in the slide presentation either
16 defendants already have it, or it is in public knowledge, so
17 any links to anything that is indicated in the presentation
18 refers to videos.

19 With respect to the games that defendants have
20 cited in their own papers, and again, we have not had an
21 opportunity to respond to defendants' response, preliminary
22 injunction --

23 THE COURT: Because in a preliminary injunction
24 setting usually there is no reply because you are the one
25 seeking the relief, you are supposed to put on your best

1 case right off the top, and then they show cause why the
2 injunction should not be issued.

3 Let me see what they produce, okay?

4 At the end of the day, this is a discretionary
5 matter, and I can choose to view or accept it if I think it
6 is going to help me make the right call. If it is such that
7 I believe it is creating some kind of undue prejudice to
8 you, because you have not seen it before, and you think you
9 need some additional argument, I may give you some time to
10 respond to something, but let's just take it one step at a
11 time. I think that's the fair way to do it.

12 MR. MOSKIN: Thank, your Honor.

13 I do want to note, I did begin by saying I didn't
14 want to interrupt them, so I wanted to raise it so as to
15 allow --

16 THE COURT: Your objection has been noted.

17 At end of his presentation, if you think there are
18 things in there that you were not aware of and could not
19 fairly have anticipated in your arguments, and you need to
20 have some additional time or something, I will consider
21 that. I am not saying I am going to give it to you, but at
22 least I will consider it once I listen to it, okay?

23 MR. MOSKIN: Thank you.

24 THE COURT: Counsel, I gave you both an hour. I
25 don't think you need an hour. I was trying to be nice and

1 give you as much time as I thought was necessary, but I have
2 read your briefing. This is not all that complicated. I
3 mean, it is a serious matter for your clients, and I
4 understand that. But in terms of the amount of argument
5 that you may need as to whether or not a preliminary
6 injunction should issue or not, I don't know if you
7 necessarily need the hour, but let's get going and see where
8 we go from there.

9 MR. SHEIKH: Your Honor, first off, I would like to
10 thank the Court for the opportunity to argue today for about
11 an hour, but my intention in going through the presentation
12 was to make things a little bit more clear for your Honor as
13 we go through this process.

14 My initial plan was to probably take about 40 or 45
15 minutes to go everything in the PowerPoint and also in
16 argument to the Judge --

17 THE COURT: Let's get started, because I have
18 reserved until one o'clock. We got started a little late
19 because there were technical difficulties on the setup.
20 It's okay, but let's go.

21 MR. SHEIKH: Your Honor, I apologize in advance. I
22 am dealing with a sore throat today, so if my voice sounds
23 raspy or if I am putting something like a lozenger in my
24 mouth, I apologize in advance.

25 Your Honor, we are here today before your Honor to

1 seek a preliminary injunction based on defendants'
2 infringement of the '223 patent. Every day that the
3 defendants infringe the '223 patent, High 5 is harmed by the
4 defendants' conduct.

5 Now, High 5 Games is an award winning developer of
6 casino games for the land based social and mobile markets.
7 It has one of the highest ranked social casinos on Facebook
8 and the largest agent themed social casino out there today.

9 High 5 has created a Super Symbols invention and
10 was issued the '223 patent on May 27th, 2014, and that date
11 is a very important date because that is specifically the
12 date that the patent was issued in this case.

13 It is not -- the Super Symbols invention and the
14 Super Symbols games that come out of that invention are not
15 simply games with oversized symbols. They have unique,
16 very, very specific unique features that are deployed in
17 High 5's games.

18 These same features are in defendants' Mega Symbols
19 games that they market as Storm Queens and Red Moon. The
20 Mega Symbols games look and play like High 5 games' Super
21 Symbols games, and it is our contention that the Mega
22 Symbols games infringe the '223 patent.

23 Now, as clear, as set forth in the declaration of
24 defendant, Dan Marks, defendants are making profits with the
25 Mega Symbols Games, and defendants are damaging the value

1 and exclusivity --

2 THE COURT: How long have they been in the market
3 with their games?

4 MR. SHEIKH: To our knowledge, your Honor, they
5 have been in the market with the Mega Symbols games since
6 September of 2013.

7 THE COURT: 2013.

8 MR. SHEIKH: That's right.

9 THE COURT: And you have known about this since
10 2013, right?

11 MR. SHEIKH: We have known that the Mega Symbols
12 games were in the marketplace since 2013, that's right.

13 THE COURT: So where is your immediate irreparable
14 harm with the emphasis on "immediate"?

15 MR. SHEIKH: Well, your Honor, to clarify what was
16 happening at the time in September of 2013, and I want to
17 reiterate the fact that the patent did not issue until May
18 27th, 2014, but at the time, in September of 2013, High 5
19 games was at the 2013 G2E Show, and while they were getting
20 ready to deploy their own Super Symbols games, they noticed
21 in Aristocrat's booth that they were marketing and selling
22 games that included this Mega Symbols feature.

23 At the time these were land based casino slot
24 boxes, and so when they saw what Aristocrat was doing, the
25 slot boxes themselves had Aristocrat's logo, but also had

1 Gimme Games' logo who is a defendant in this case.

2 At the time, High 5 believed that Gimme Games and
3 the three individual defendants that were named in this
4 lawsuit had misappropriated the Super Symbols technology as
5 well as other technologies of High 5 games.

6 THE COURT: So if you believed that, why didn't you
7 go for your injunction at that time?

8 MR. SHEIKH: At the time, your Honor --

9 THE COURT: I know you didn't have your patent, but
10 you felt that they had appropriated trade secrets, right?

11 MR. SHEIKH: Yes.

12 THE COURT: So if there was going to be irreparable
13 harm, immediate irreparable harm, it existed as of that
14 time, right?

15 MR. SHEIKH: Well, one of the things I would like
16 to make clear is, again, the games that were being deployed
17 in September of 2013 were around the land based market. As
18 our papers indicated, right now High 5 Games has a licensing
19 arrangement with a distributor called Bally with respect to
20 those land based games. And so if we came to court at that
21 time seeking an injunction, then one of the things that the
22 Court would have asked us is: Well, aren't any damages that
23 are available in this case easily quantifiable based on the
24 licenses that you have with Bally.

25 That was the actual factual scenario that existed

1 in 2013.

2 THE COURT: How does it, now moving from a land
3 base to I guess an electronic base --

4 MR. SHEIKH: Yes.

5 THE COURT: -- customer base, how does that make
6 the damages any less quantifiable monetarily?

7 MR. SHEIKH: Well, the revenue model is completely
8 different once you move to a social casino as opposed to
9 deployment of these land based casino games.

10 THE COURT: And it would make it more difficult.

11 MR. SHEIKH: It would make it more difficult, and
12 as defendants acknowledge in their own papers, they
13 themselves in their own social casino can't quantify the
14 effects that Mega Symbols games has to the revenue stream in
15 Jackpot Dreams versus any other games.

16 And the reason for that is because the way that you
17 make money in social casinos is very different. It is not
18 only the users that are buying virtual coinage in the social
19 casino, but based on the number of users that actually come
20 into your social casino, there are opportunities to
21 advertise and market and also engage in other customer
22 relationship efforts to monetize the amount of users whether
23 on a monthly or daily basis that are actually in the social
24 casino. So it is a very, very different revenue and
25 monetary model than exists in the land based casino market.

1 THE COURT: Okay. Go ahead.

2 MR. SHEIKH: So just going along that theme, your
3 Honor, with respect to the social casino, again, the date --
4 the date -- there are a few dates that are important in this
5 case. September 2013, that is when High 5 Games first
6 became aware that Gimmie Games was misappropriating its
7 trade secret technology.

8 Now, at the time High 5 Games believed that Gimmie
9 Games had misappropriated that technology and was
10 distributing and licensing that technology to Aristocrat.

11 At the time High 5 did not understand that
12 Aristocrat was any kind of bad actor, and that's why with
13 the cease and desist letter that it sent to Aristocrat, what
14 it was really saying to Aristocrat was: Look, you know
15 what? You have to think twice with respect to who you are
16 getting into business with. These guys, Gimmie Games, have
17 misappropriated our technology, and so by you distributing
18 any of these games, you are making the wrong business
19 decision.

20 So fast forward, and in late 2013, High 5 Games did
21 not sit on their hands, but instead filed a lawsuit against
22 Gimmie Games and also the three individual defendants for
23 trade secret misappropriation and breach of contract.

24 Now, if we fast forward, your Honor, to May of
25 2014, that is when the patent issued. And instead of,

1 again, sitting on their hands, what High 5 did again because
2 it really had no understanding that Aristocrat -- these were
3 Aristocrat games. In fact, your Honor, when we got
4 defendants' opposition papers, and it was listed as
5 Aristocrat's games as opposed to Gimmie Games, that gave me
6 pause because at the end of May of 2014, the indication was
7 that Aristocrat was distributing Gimmie Games' games into
8 the marketplace.

9 So the first thing that High 5 Games did was went
10 to go talk to Aristocrat and said: Look, you know what?
11 Now it is not just trade secret misappropriation. There is
12 a valid patent out there. You have to be careful about what
13 games you are distributing of Gimmie Games.

14 Now, to make it clear for your Honor, this was not
15 just the Super Symbols Games. The conversation was not
16 around just Supper Symbols with respect to the patent, but
17 also around all of the technology that High 5 Games believed
18 that Gimmie Games was misappropriating.

19 At the time in that conversation Aristocrat had
20 that conversation, and it decided not to stand down and stop
21 distributing the games from Gimmie Games.

22 Now, what happened then?

23 Again, at the time High 5 Games believed that this
24 was only a land based casino issue in the distribution.

25 It was in early August of 2014, as indicated in Mr.

1 Nadooshan's declaration that they first became aware that
2 High 5 -- that defendants were actually deploying these
3 games into their social casino, and I actually have a screen
4 shot that was submitted in our papers to your Honor on
5 Gimmie Games' actual website. The press release is not
6 dated before June 20, 2014. That is the date of the press
7 release on Gimmie Games' own website, where they say, now
8 you can play these Mega Symbols games on the social casino
9 site.

10 So when defendants bring up the fact that Jackpot
11 Dreams, which is the name of Aristocrat's social casino had
12 been around since January 2014, they themselves in their own
13 papers say that, Look, it is not just Mega Symbols games
14 that are being played on Jackpot Dreams, and that there were
15 games that were actually added to Jackpot Dreams after that
16 social casino was initially launched.

17 Now, I have spoken to Mr. Fallon, and he can
18 certainly speak for himself, where as he may have logged
19 into Jackpot Dreams in January and February of 2014. The
20 first indication that High 5 had that defendants were
21 actually deploying the Mega Symbols games into the
22 marketplace, into the social casino marketplace, was early
23 August 2014.

24 Defendants raise certain defenses to this
25 preliminary injunction application, and you know, frankly

1 your Honor, I have to say their papers are very, very good.
2 They are very good writers. But when you drill down, their
3 arguments fall down almost like a house of cards. And what
4 I would like to do for your Honor is to kind of go through
5 each of their arguments that they raise in their opposition
6 papers and talk about what our response is to those
7 arguments just for the Court's benefit.

8 So the first argument they say is that Mega Symbols
9 games do not infringe on the '223 patent.

10 Defendants, if you read through their entire
11 papers, seem like they are raising two issues. One of the
12 issues that they are raising is that each of the symbol
13 positions in the Mega Symbols games, that is their games,
14 has only one symbol at each symbol position.

15 Well, having more than one symbol at each symbol
16 position is not an element of the '223 patent, and we can go
17 through exactly the visual claim chart that we submitted in
18 our initial papers to indicate why that is not an element
19 of the '223 patent itself.

20 The second --

21 THE COURT: Counsel, you understand that today we
22 are not here for the merits of the case. There is a
23 likelihood of the success of the merits that needs to be
24 addressed, and I understand why you need to get into some of
25 this, but what you really need to convince me of is that you

1 meet the four elements that are necessary for a preliminary
2 injunction, likelihood of success on the merits, irreparable
3 harm. You need to have those, or you are going to have a
4 problem getting this extraordinary remedy, which is what a
5 preliminary injunction is, and of course, the other two
6 elements.

7 So although obviously I will give you leeway to
8 talk about your likelihood of success, which is what this
9 really goes into, I do want you to spend some time on the
10 irreparable harm part of it. I just don't want to turn this
11 into a summary judgment type of argument because that is not
12 what it is today, right?

13 MR. SHEIKH: Absolutely, your Honor.

14 And you're absolutely right. The reason why I am
15 talking about infringement at all is to talk about the first
16 prong of a preliminary injunction analysis, which is
17 likelihood of success on the merits.

18 With respect to that prong, not only are there
19 arguments that they are not infringing the patent not valid,
20 but also they raise two other issues, claim construction
21 issues and also validity issues, and I can talk about that,
22 your Honor, because I think it is an important piece to
23 understand why High 5 Games would -- there is a likelihood
24 that we would succeed on the merits just on the patent
25 infringement itself. But if your Honor would like me to

1 start with the irreparable harm, you know, in a summary
2 fashion right now --

3 THE COURT: Well, I am trying to help you manage
4 your time. I think certainly you should talk about your
5 infringement claims and why you have a likelihood of success
6 on that. But I want you to spend more of your time in
7 convincing the Court that there is an immediate irreparable
8 harm that will issue, that is not compensable in monetary
9 damages, if this injunction does not issue now --

10 MR. SHEIKH: Well, the immediate irreparable
11 harm --

12 THE COURT: -- you can do it whichever want you
13 want --

14 MR. SHEIKH: I understand.

15 THE COURT: -- I am not suggesting you need to jump
16 to that. I am just suggesting because I don't want to cut
17 you off later on --

18 MR. SHEIKH: But I at least want to --

19 THE COURT: -- but those are the two prongs that I
20 really want to hear from you.

21 MR. SHEIKH: -- I at least want to tee up that
22 issue for your Honor, just so you understand exactly where
23 we are coming from with respect to the irreparable harm.

24 Now, from our perspective, defendants are damaging
25 the value and the exclusivity of the '223 patent by

1 infringing the '223 patent with their Mega Symbols games.

2 One of the things that again are in our papers is
3 the slot game industry changes very quickly. There is an
4 immeasurable risk that technology would bypass High 5's '223
5 patent by the conclusion of this litigation. And, you know,
6 defendants concede in their own papers the difficulty of
7 segregating the revenue effect of Mega Symbols to the other
8 games that are in their social casino.

9 So in the social gaming space, user acquisition is
10 key, and so as users come into a social casino, they play
11 other games. They are monetized through -- not just
12 purchasing virtual coins to play those other games, but also
13 through advertising itself.

14 And so because of the speed of the industry and
15 because of the difficulty in quantifying the revenue effects
16 of the games themselves, once they are in the social casino,
17 and also the difficulty in quantifying the numbers of users
18 High 5 may have lost to defendants --

19 THE COURT: Why is it difficult to quantify it?

20 MR. SHEIKH: Because once you are in the social
21 casino, your Honor, you can play any game you would like,
22 and so the Mega Symbols Games, they are drawing people into
23 their social casino, and once they are there, they can play
24 any game they like once they are there, so that there is a
25 difficulty in quantifying exactly what do the users do once

1 they are in the social casino.

2 THE COURT: Why can't that be done electronically,
3 I mean, through computer experts and so forth?

4 Why can't you figure out when this person entered
5 the social casino at X number of hours, right, which is one
6 of my customers, and then these are the other games they
7 played?

8 Isn't that all electronic data that is going to be
9 available in this case?

10 MR. SHEIKH: Well, yes, your Honor, but the
11 difficulty there, though, is how much money do you make once
12 that user starts playing that game, because again, the
13 difficulty in quantifying the damages here is that the users
14 buy virtual coins that then they can deploy in different
15 areas.

16 But what makes it really difficult is they are
17 purchasing the virtual coins, but they are also given free
18 virtual coins, and so the amount of coins that any specific
19 coin, whether it's purchased or given for free, that the
20 actual user is using to play these games is very, very
21 difficult to quantify.

22 But even beyond and above that, there is an
23 advertising model at work here, and so the number of users
24 that come into the social casino, no matter where they are
25 in the social casino, no matter what they are doing and no

1 matter what they are playing, they are being fed
2 advertisements, and based on those advertisements the
3 company also makes money, so the issue here is, again,
4 different from a land based casino perspective.

5 In a land based casino when we have a
6 distributorship model, you can look at the licensing fee and
7 say, look, the amount of games that are being distributed
8 out into the marketplace, and you can look at the potential
9 license and the potential royalty that may come from that
10 land based game, and then you can quantify the harm based on
11 the number of games that were actually distributed by that
12 distributor. The revenue model in a social gaming
13 context --

14 THE REPORTER: I'm sorry. Can you just slow down?

15 THE COURT: Yes. You are talking very fast.

16 MR. SHEIKH: I'm sorry. When I get excited, I
17 don't know how fast I'm speaking, so I appreciate that.

18 But that is what makes it difficult, your Honor.

19 Again, even in the declaration of Dan Marks, he
20 does say that they themselves can't split apart the actual
21 profits that they get from the Mega Symbols games versus the
22 other games once users comes into that social casino, so the
23 fact they are deploying these Mega Symbols games into their
24 social casino makes it very, very difficult because for the
25 same reason for High 5, is as users move to other social

1 casinos away from High 5, especially a social casino that is
2 deploying the same exact game using the same exact mechanics
3 that High 5 uses, it is not as though they shut off the user
4 account at High 5. They just stop playing or they play
5 less, and so the metrics of revenue generation for High 5
6 then has to change because to keep those users, they may
7 have to deploy additional free coins. They may have to
8 differentiate their advertising models based on, you know,
9 less users or less eyeballs or differentiation of how users
10 are actually moving through that social casino, so it is a
11 very, very different metric in a revenue model and very,
12 very difficult to quantify, you know, for the parties and
13 for the Court.

14 THE COURT: Okay.

15 MR. SHEIKH: Your Honor, to go back to just our
16 general -- the general objections that defendants raise in
17 their papers, they argue that Aristocrat games do not have
18 any statically positioned symbols, but if your Honor would
19 allow us, we have a video of their games that makes it clear
20 that the oversized symbol and regular symbol spin together
21 at the same rate, and the symbols that appear above the
22 oversized symbol and that appear below the oversized symbol
23 maintain their relative positions during and after the spin.

24 THE COURT: Now, oversized symbol games existed in
25 the market from other entities as well, right?

1 MR. SHEIKH: And nobody is disputing that, your
2 Honor, and for that reason, as defendants keep bringing up
3 oversized symbol games, I think one thing that we made clear
4 throughout this case is that we are not talking about just
5 oversized symbol games. If we came into court today and
6 said --

7 THE COURT: What is it that makes you unique?

8 MR. SHEIKH: There are two aspects that make it
9 unique, and I will be going into that in a little bit more
10 detail, but in a nutshell, it is: One, that Super Symbols
11 games have non expanding statically positioned oversized
12 symbols, and also that the reels that it is attached to spin
13 on and off, meaning they rotate on and off, the actual
14 display device at the same rate.

15 So those are the two unique elements, and one of
16 the things that defendants put in their own papers are
17 partial responses to Interrogatories 7 and 8 in this case,
18 and the interrogatory makes clear -- our response makes
19 clear with respect to Super Symbols, that these are the
20 unique attributes.

21 And as when we go through the presentation, even
22 when we look at the difference between the application that
23 was filed for Super Symbols and the actual patent that was
24 issued, there is very -- there is language that is distinct
25 from the application that makes clear the unique features

1 that were necessary to differentiate it from prior art, such
2 as the Jensen patent and the Jaffe patent.

3 Defendants also argue that we need to undergo claim
4 construction, but none of -- in our view, your Honor, that
5 none of the terms require claim construction. All of the
6 terms should be interpreted by their plain dictionary
7 meaning or by their intrinsic definition per the patent --

8 THE COURT: That is an argument that you always
9 hear at the time of the Markman hearing.

10 I think what the defendants are saying is: How can
11 you, without defining the terms, figure out whether the
12 plaintiff is going to have a likelihood of success on the
13 merits, because the definition of the terms may affect your
14 ability to win the case.

15 MR. SHEIKH: Well, it is interesting, your Honor,
16 the terms that they bring up, because, for example, and I
17 will just list it down, Dan Marks, who is a defendant in
18 this case, has used many of the terms that they say are
19 ambiguous now in prior patents relating to slot games or
20 video slot games of which he is a co-inventor. So with
21 respect to the term "reel," he has used it in 54 prior
22 patents or patent applications.

23 "Display device," he has used in 30 prior patents
24 or applications.

25 "Spin" in 55 prior patents or patent applications.

1 "Winning symbol combination," 52 prior patents or
2 patent applications.

3 So the idea that the entire list of terms that
4 defendants say needs some kind of construction, I think,
5 your Honor, is a little bit disingenuous because at least
6 for defendant, Dan Marks here, and Dan Marks is the founder
7 of Gimmie Games and is working with Aristocrat, and he's
8 well aware of what these terms mean, specifically in the
9 video slot industry.

10 And to go with that, if we look at the file history
11 specifically of patent 7796796, and I know that number, and
12 I throw it out there because I want the reference there, it
13 includes the terms "reel, spin, winning symbol combination."

14 That application was originally filed by Stepto and
15 Johnson, but after the filing, Marks revoked the power of
16 attorney and responded to the office action pro se.

17 On Page 16 of that specification application, it
18 states: The present invention will be embodied in an
19 electronic video slot machine. However, mechanical slots
20 and other types of gaming devices are envisioned.

21 So, again, to defendant Dan Marks himself, there is
22 no distinction between now suddenly video slot machines are
23 so different than mechanical slot machines, or that the
24 terms " reel" or "spin" or "winning symbol combination"
25 should be construed in a manner that's different than was

1 construed before, especially by the co-inventor himself.

2 Defendants also argue that prior art anticipates
3 the '223 patent or makes it obvious. None of the games, not
4 one of the games or patents cited by defendants that predate
5 the '223 patent have all of the limitations disclosed in our
6 patent, so none of them anticipates our patent, and it is
7 not obvious to combine the features shown in these games, so
8 there is no obviousness issue.

9 Specifically -- and I know we are not going to have
10 time to do this -- but if your Honor would like to look at
11 any specific games, where we can show clear distinctions
12 between Super Symbols and the games that are cited by
13 defendants, I am happy to do that.

14 If your Honor so wishes, we also have a video
15 comparing Super Symbols and Mega Symbols and playing them
16 side by side to show you exactly why their games mechanics
17 and their appearances and their play, why they look and feel
18 so much the same.

19 THE COURT: How does the differences between the
20 two games, if any, you say they look very similar, right?

21 MR. SHEIKH: They look very similar, your Honor.
22 The artwork is different. I mean, certainly there is more
23 than one Super Symbol --

24 THE COURT: How does that diminish your reputation?

25 That is one of the arguments that you make, that it

1 affects your reputation and your trademark, right, or
2 your --

3 MR. SHEIKH: Well, so the reputational element is
4 that there is an infringing product out there that is
5 exactly the same as our product, and you know, any user can
6 now go to Jackpot Dreams or another social casino and
7 attribute these games to defendants instead of High 5.

8 The reason why it diminishes our reputation is
9 because our reputation --

10 THE COURT: That is an infringement argument, but
11 not --

12 MR. SHEIKH: Well, our reputation has been built,
13 your Honor, on creating unique games in the marketplace.

14 If suddenly the games are not unique any more, the
15 reputation suffers because High 5's reputation in creating
16 this novel unique games will be no more.

17 Anybody can look at these other games out there and
18 say, Well, you know what, what is so unique about High 5?

19 THE COURT: So these games were out on the market
20 before you got your patent, right?

21 MR. SHEIKH: Yes.

22 THE COURT: And I assume this was disclosed to the
23 patent office as prior art, or how did that work?

24 Was the patent office aware that these games
25 existed?

1 MR. SHEIKH: The Mega Symbols games?

2 THE COURT: Yes.

3 MR. SHEIKH: I don't know the answer to that
4 question, your Honor, but Mister --

5 THE COURT: It is a little confusing for the Court
6 how you were able to prosecute and obtain a patent on games,
7 and then say, however, the games that existed before me are
8 now infringing on my patent --

9 MR. SHEIKH: Well, your Honor --

10 THE COURT: -- I get the land based versus the
11 social, but that doesn't change the essence of the patent --

12 MR. SHEIKH: The Mega --

13 THE COURT: -- right?

14 MR. SHEIKH: -- the Mega Symbols Games did not
15 exist prior to the Super Symbols games. In fact, the
16 existence of the Mega Symbols games was made apparent on --
17 on -- in September 2013 --

18 THE COURT: You said in 2013, which precedes your
19 patent, correct?

20 MR. SHEIKH: That is right, your Honor.

21 THE COURT: So these games that you now claim to be
22 the infringing games, right, existed in the market and in
23 the public domain prior to you obtaining your patent, right?

24 MR. SHEIKH: Well, just to -- just to -- just to
25 set a time line here, so the patent issued on May 27th,

1 2014. The initial provisional patent application was filed
2 in 2011, and the actual patent application was filed in 2012
3 and then made public in July of 2013.

4 So the patent application had been filed with the
5 PTO prior to the existence of these Mega Symbol games, and
6 also made public as well.

7 But with respect to anything specifically that the
8 PTO may or may not have known, Mr. Fallon would have a
9 deeper understanding of that, and I am sure he would be
10 happy to answer any questions the Court may have with
11 respect to that subject.

12 THE COURT: Well, I know this Court has handled
13 numerous, numerous patent cases, that when you go to the PTO
14 to obtain a patent, part of your duty of candor to the PTO
15 is to submit any prior art that exists in the marketplace,
16 and it is sort of, and I guess I will figure it out, but it
17 is sort of surprising to me that there would be an item out
18 there on the market that you are now claiming is infringing,
19 but existed before you even got your patent.

20 MR. SHEIKH: I think, your Honor, it may go to the
21 specifics of --

22 MR. FALLON: Your Honor, the definition of prior
23 art under patent laws relates to anything that was known in
24 the public or published prior to the filing date of a patent
25 application --

1 THE COURT: Right.

2 MR. FALLON: -- none of the Mega Symbol games
3 existed prior to 2013 --

4 THE COURT: That is my question. Did they exist
5 prior to your filing date?

6 MR. FALLON: No, they did not, your Honor.

7 MR. SHEIKH: No.

8 THE COURT: Because the whole thing was, though, we
9 had been talking as though you became aware of their games
10 in 2013. I didn't know that that is when they were first
11 invented or used.

12 Is that what you are saying?

13 MR. FALLON: Correct, your Honor.

14 I believe further on in -- it was either late 2012
15 or early 2013, they were first conceived, created by Gimmie
16 Games, and that was at least one year after our filing of
17 our patent application.

18 THE COURT: Okay. Well, that clears something up.

19 MR. SHEIKH: So when we say, we first became aware
20 of the games, that is first when we became aware, but that
21 is also --

22 THE COURT: You just became aware, but they had
23 existed for years for all I know.

24 MR. SHEIKH: That is not the case. That they first
25 became -- to our understanding, they were first marketed at

1 that September 2013 G2E Show.

2 THE COURT: Go ahead.

3 MR. SHEIKH: Then -- so finally, they also argue
4 High 5 Games is not being harmed by deployment of the Mega
5 Symbols games.

6 One of the things that they say is that High 5 has
7 been aware of the infringement since September 2013 and did
8 not seek an injunction.

9 As I laid out for your Honor already, what happened
10 in this case is not that we sat on our hands since September
11 2013.

12 In September 2013, we became aware of a possible
13 trade secret misappropriation by Gimmie Games and the
14 individual defendants. We put Aristocrat on notice that
15 they should not be distributing these games, that Gimmie
16 Games is violating our intellectual property rights, and
17 they should not be engaged in the distribution of these
18 games.

19 In May 2014, again, we went to Aristocrat. We said
20 to them, you know what? Now, we have a validly issued
21 patent. Do not distribute Gimmie Games.

22 It was only after we found out that these games
23 were being deployed in the social casino market in early
24 August 2014, that within two weeks we came to the Court
25 seeking preliminary injunctive relief.

1 They argue that any damages are compensable via
2 monetary relief.

3 As I said before to your Honor, the model for
4 social casino gaming is different, so High 5 makes money
5 again using virtual coins and advertising. The games are
6 not licensed to distributors as they are in land based
7 casino games. So the fact that High 5 Games has a license
8 with Bally, it doesn't affect exactly what they are losing
9 from the social casino side, because again, the revenue
10 metric is completely different.

11 They say that High 5 has failed to identify any
12 harm. But as we say in our papers, approximately 50 percent
13 of High 5's revenue comes from its social casino. And
14 revenue growth is driven by the number of daily and monthly
15 gamers or users playing games on a platform by placing and
16 selling High 5's technology into their social casino, they
17 are drawing in game players.

18 Once the players are in that social casino, they
19 may stay and play defendants' other games. In effect,
20 defendants are using the Mega Symbols games that infringe on
21 Super Symbols to drive traffic into their own social casino.

22 If we look at the Facebook page, now, defendants
23 say, you know, why didn't we include the Facebook page, and
24 I'm happy to pull it up for your Honor, right in the front
25 there are these Mega Symbols games that are featured.

1 Now, one of the things that Dan Marks says in his
2 own declaration is that there have been games that have been
3 added to that social casino. So even if anybody from High 5
4 was on that Facebook site, they did not notice Mega Symbols
5 games on that site.

6 But right now if you are go onto that website, they
7 were using the exact same Mega Symbols games as their
8 biggest advertisement to draw traffic into that Facebook
9 site. And, again, so defendants can see that there is no
10 way to separate the revenue effect of Mega Symbols games and
11 that other games -- in effect, what they are saying is that
12 they will not be able to provide High 5 in the future with a
13 breakdown of what Mega Symbols is actually making in their
14 social casino.

15 So the question is: Should defendants be allowed
16 to continue to infringe on the '223 patent and use these
17 games in their social casino, draw users in, make profits
18 from it, while given the speed of the technology and the
19 speed of the industry, High 5 has no revenue here except to
20 watch them continue to make profits from their games.

21 That is the real question before the Court today,
22 your Honor, is: The harm here is they are using the
23 infringing games. They are drawing users into their social
24 casino. They are harming High 5's reputation and brand
25 position in the marketplace by having non unique games in

1 the marketplace that would affect High 5's standing in the
2 marketplace and reputation, a hard earned reputation for
3 providing unit slot games into the marketplace.

4 Your Honor, one thing that I would like to make
5 clear is when we are talking about defendants, we are not
6 talking about just an independent company that is routed out
7 and are making these slot games. The individual defendants
8 are all former employees of High 5 Games.

9 One of the claims that we make in the trade secret
10 misappropriation case is they had knowledge of, you know,
11 specific secrets of High 5. We talk about Super Stacks in
12 that case. This was a different invention, and Super
13 Symbols, and when left -- Dan Marks specifically left and
14 informed Gimmie to compete in the slot game market.

15 Now, Joseph Masci and Brian Kavanagh, they are two
16 defendants. They have submitted certifications in
17 opposition to this preliminary injunction. The points that
18 they make is Joseph Masci says, Well, you know what? I am
19 just a creative director. I had no connection to the
20 technology or understanding of the games.

21 He was still at High 5 when Super Symbols was
22 conceived and invented at High 5 Games before he went to
23 Gimmie, but he is not just a creative director, and the idea
24 that he had no access to technology is a little bit I would
25 say misleading because Joseph Masci himself has eight

1 patents for which he is a co-inventor of the slot games. So
2 he is not just doing creative work. He's not just doing
3 artwork. He is a co-inventor of eight patents in the area.
4 He is certainly aware of, you know, how these games work and
5 how they are invented, and what they specifically do.

6 Defendants, Gimmie Games and Marks Studios, were
7 created by Dan Marks after he left High 5 Games.

8 Now, if we look at the social media side, which is
9 public, Linked-In, it shows that Dan marks started a company
10 called Marks Studios.

11 In defendants' answer to counterclaims, they say
12 that Marks Studios is the actual legal name for Gimmie
13 Games.

14 Well, if that is the case, then he actually started
15 Marks Studios during his non compete period. What he
16 specifically did there, we have no idea. We have not gotten
17 any discovery from defendants, not even one piece of it from
18 defendants at this point, but that is one of the issues that
19 is going to exist in discovery, but I want to frame this
20 issue for your Honor, because, again, this is not an
21 independent company that is just doing their own thing and
22 High 5 is taking offense to that.

23 These are former employees of High 5 Games that
24 went out and started a new company and are now competing
25 with High 5 and making games that look and play exactly like

1 the Super Symbols games, and it is our contention that they
2 would have never gotten to that place unless they had the
3 specific information that they took from High 5 Games.

4 THE COURT: All right.

5 Are there any slides that you want me to see,
6 unless you have any new arguments?

7 I mean, most of what you are saying is verbatim
8 from your brief, which I have read, but if there are some
9 slides that you think are going to clarify anything for
10 me --

11 MR. SHEIKH: Your Honor, what I can do is I can
12 flip through --

13 THE COURT: You don't have to, but if you think
14 that there is something there that would help your position
15 to have me see it, I would be happy to see it.

16 MR. SHEIKH: Well, your Honor, what I would like to
17 do is just flip through the slides. I will stop at any
18 point that we have not already covered. And if there are
19 specific videos or screen shots or specific games that your
20 Honor would like to take a look at, I am happy to focus on
21 those because again I don't want to waste the Court's time.

22 So with respect to Super Symbols, we already talked
23 about this, but unlike other games that contain oversized
24 symbols, the games with the Super Symbols feature
25 incorporate at least one statically positioned non expanding

1 oversized symbol that occupies more than one symbol --

2 THE COURT: Counsel, Counsel, you already said
3 that, and you said it in your brief. Let's not repeat
4 ourselves because that doesn't bring anything to the table
5 here.

6 MR. SHEIKH: So one thing, your Honor, I touched on
7 this briefly, this is the difference between in the patent
8 application and the actually issued patent, the red bold and
9 underlined and the green bold and underlined were added
10 during the PTO process, and the bolded sections are
11 amendments made to the patent application during the
12 prosecution of the actual patent to distinguish it from the
13 Jaffe and the Jensen patent, two patents that defendants
14 have cited as relevant prior art, so the Jaffe patent and
15 the Jensen patent were considered during the USPTO process.

16 Defendants distribute the Mega Symbols games, like
17 we said in our papers already, this is a screen shot of
18 their website, where they indicate on June 20th, 2014, that
19 now you can get the Mega Symbols games available on the
20 Jackpot Dreams social casino.

21 These are two videos of Super Symbols versus Mega
22 Symbols. The Super Symbols Game I have is called Ocean's
23 Glory. It was actually the first Super Symbols Game that
24 was rated. Aristocrat's Flame Queen is one of the Storm
25 Queens.

1 Would it be useful for your Honor for me to play
2 these videos, so you can see exactly what we are talking
3 about?

4 THE COURT: Yes, please.

5 MR. SHEIKH: For the relevant section here, your
6 Honor, we will start at 15 seconds.

7 But as your Honor will see, if you look at the
8 large symbol right here, once it spins, it is spinning at
9 the same rate as the non oversized symbols that are above
10 and below it, and it's not expanding and it's static,
11 meaning it is in one place with respect to the smaller
12 symbols that are right above.

13 (Video played)

14 MR. SHEIKH: Your Honor, if you look at the Storm
15 Queens Game, and I will flip ahead to -- and I will play the
16 whole thing, but it is most relevant at the 35 second mark.

17 THE COURT: Right.

18 (Video played)

19 MR. SHEIKH: Again, if you look at the actual
20 oversized symbol, it is static with respect to the non
21 oversized symbols above and below it, and it is spinning on
22 and off the display device at the same rate as the non
23 oversized symbols.

24 So the two unique attributes that we have
25 identified and that are unique with the '223 patent

1 specifically are used in their Flame Queen game exactly the
2 same as our Super Symbols game.

3 Now, again, we don't have the time today, but if
4 your Honor -- one of the things that may be useful to see is
5 to start going through some of the games.

6 Your Honor, I won't go through everything with
7 respect to claim construction for each of these things. As
8 I mentioned, Dan Marks uses some of these terms in prior
9 patent applications like "reel, display device, spin," and
10 for terms like "display device," we can use intrinsic
11 evidence that are right at the four corners of the patent.

12 For example, if we look at Figures 3A and 3C and 5A
13 the other figures that are cited, it is clear what that
14 display device is meant to be with respect to this patent.

15 You have predetermined winning symbol combination.
16 There's support that's found right in the patent itself.
17 All winning combinations are defined by pay tables. The pay
18 tables are defined. There is a figure in the patent itself
19 that talks about how the pay tables and winning combinations
20 are supposed to be calculated.

21 When we come to statically positioned non expanding
22 oversized symbol, the meaning from our perspective, your
23 Honor, is plain on its face. The oversized symbol has a
24 fixed size. The symbol position is fixed on the reels.

25 Mr. Ballone, who is the director of game design for

1 High 5 Games, in his declaration talked specifically about
2 what "static" means in this context.

3 Statically position because the oversized and
4 regular sized symbols fit together at the same rate, and the
5 symbols that appear above and below maintain their relative
6 positions.

7 We can also find intrinsic support for statically
8 positioned non expanding oversized symbol in the drawings of
9 the patent itself, specifically Figure 5A.

10 (Video played)

11 MR. SHEIKH: Your Honor, these are the games cited
12 by defendants, games such as Fire Light, Fire Light II, Game
13 Tech, Planet 7, and Willy Wonka, Happy Days.

14 What we have done is we've looked at each of these
15 games and looked at whether they contain a statically
16 positioned non expanding oversized symbol occupying at least
17 a plurality of symbol positions or at least a plurality of
18 reels and at least one reel of plurality of reels as other
19 sized symbols thereon.

20 As you can tell, not any of them, and this chart
21 actually goes on, not any of them consist of all three
22 elements of what makes the '223 patent unique.

23 There are some games that are cited such as, for
24 example, Mirror Ball, King Colossus, Hit and Riches, Riches
25 of the Arena, Dragon's Bounty, and all of the one up Mega

1 Blocks Games. All of these games actually contain the
2 embodiments of the '223 patent, but all of them were copycat
3 games that were actually launched in 2014.

4 So from an obviousness perspective as well, as the
5 Court is aware, that is one element of the analysis for
6 obviousness is the number of copycat games or the copying
7 that existed after the patent was issued. The patent here
8 was published in July of 2013.

9 After that, we see a series of copycat games being
10 launched into the market.

11 Now, defendants spent a fair amount of time talking
12 about Fire Light. Fire Light does not use oversized symbols
13 in the game. Instead, it treats three or more symbols of
14 the same kind across a horizontal pay line, and as shown in
15 the screen shot below, the combination of the three Ks and
16 the upper pay line and the three eagles in the center pay
17 line are both treated as oversized symbols, but as your
18 Honor can see, they are not oversized symbols as High 5 Game
19 is using that term.

20 Now, in Fire Light, the first two reels have the
21 same symbols and similarly the last two reels have the same
22 symbols in adjacent reels.

23 The Mega Symbols games do not mandate symbols -- or
24 the Super Symbols games do not mandate that symbols be
25 paired in adjacent reels. So the Fire Light game is a very,

1 very different game than Super Symbols, and even their own
2 Mega Symbols.

3 Fire Light II is the same. The first two and last
4 two reels have paired symbols only during the bonus round.

5 During the regular play, the symbols on reels one
6 and two, and four and five are not paired in the symbol
7 positions. And when the same symbols appear adjacent to one
8 another in the horizontal pay line, no oversized symbol is
9 formed.

10 Now, there is one larger sized symbol all the way
11 to the right, but it does not span multiple reels as the
12 oversized symbols do in our Super Symbols games.

13 THE COURT: It does not?

14 MR. SHEIKH: It does not.

15 If you look all the way to the right, it stays on
16 the one reel. It does not expand over to multiple reels.

17 Planet 7, oversized symbols appear in the bonus
18 round of Planet 7, but the reel containing oversized symbols
19 only shows oversized symbols in one size, and this is
20 different than the Super Symbols, where the reel containing
21 oversized symbols also contains regular sized symbols in
22 different reel positions, so there's one oversized symbol on
23 one reel, no other sized symbols throughout.

24 Now, the Willly Wonka game is based, I believe it's
25 the Jensen patent or it could be the Jaffe patent, but the

1 bonus round of the Willy Wonka game shows oversized symbols
2 spanning two to four.

3 The issue with the Willy Wonka game is if you
4 look, your Honor, at this screen shot here as it keeps
5 spinning, the super sized symbol actually moves across to a
6 different reel. So right now it is reel positions three to
7 four, and it moves to reel positions two to three.

8 In our game, Super Symbols only appear in the
9 center reels and are not dynamically shifted to different
10 reels on different spins. It also looks like, and you know,
11 if you look at a video of Willy Wonka, that the oversized
12 symbol is actually overlaid on top of the other sized
13 symbols and spins at a different speed.

14 The Happy Days game is the same. It looks like the
15 oversized symbol for Happy Days is almost pasted onto the
16 reels, and so as it is spinning, the oversized symbol spins
17 at a different rate than the smaller sized symbols do.

18 Your Honor, I know I have been going on for a
19 little bit of time, and so what I would like to end with is
20 to talk about the patents that -- I apologize -- I am just
21 trying to get to the right slide.

22 THE COURT: All right. Counsel, you need to start
23 wrapping it up, though.

24 MR. SHEIKH: So in just talking about the patents
25 that they cite in their papers, the Jaffe and Jensen patents

1 were specifically considered relevant prior art and
2 considered by the USPTO, and where the PTO has considered a
3 piece of prior art and issued a patent notwithstanding that
4 prior art, a court owes some deference to that
5 PTO's decision.

6 The Berman and Ainsworth patents do not contain the
7 term oversized across multiple reels anywhere.
8 Specifically, the Berman patent does not disclose the use of
9 multiple oversized symbols on different reels within the
10 play grid.

11 Berman discloses regular sized symbols in
12 subdividing the space occupied by a regular sized symbol
13 into four sub segments.

14 The Ainsworth patent does not disclose the use of
15 oversized symbols across multiple reels. Ainsworth
16 describes an oversized symbol in a one by three setting, and
17 again, does not span across multiple reels.

18 Now, the Berman and Ainsworth patents are within
19 the field of slot machine gaming, and there is no doubt
20 about that, but the patents are not closely analogous art
21 because they do not provide any implementation of the
22 oversized symbols as discussed in High 5's '223 patent, and
23 we've talked about the games themselves.

24 So, your Honor, I will end it there. If there are
25 any specific questions that your Honor has, I will be happy

1 to answer them. Otherwise I would request that I have at
2 least ten or 15 minutes subsequent to defendants' argument
3 to rebut any points that are needed to be made.

4 THE COURT: We will see. Let me see how long we
5 have with the defendant, and I may have questions for you
6 anyway once I hear from them.

7 MR. SHEIKH: Thank you, your Honor.

8 MR. MOSKIN: Thank you, your Honor.

9 As I noted at the beginning of the hearing, we had
10 some concern that plaintiff might seek to supplement the
11 record in inappropriate ways, and I submit that all of the
12 last ten or 15 minutes of Mr. Sheikh's argument has to be
13 excluded because none of this was in their moving papers.

14 In fact, we served discovery at the outset of this
15 case in May, asking them to explain how about a dozen games
16 with oversized symbols were distinct from their patent, from
17 their -- well, at the time it was simply described as their
18 trade secret in Super Symbols. But for a more relevant or
19 directly relevant reason in the trade secret case, because
20 part of a claim of the secret case was they have to show not
21 only that there was something secret, but that it gave them
22 a competitive advantage.

23 So we asked them to say about their Super Symbols
24 trade secret, which is identical to their patent, in fact,
25 they admitted that in their Answer to Interrogatory 8, which

1 is Exhibit 20 to our papers, their Super Symbols trade
2 secret is identical to their Super Symbols patent.

3 We asked them to say in response to the
4 Interrogatory 8: Tell us what is unique. How does your
5 game distinguish over all of these prior art games that are
6 in the market, and they refused to answer.

7 Your Honor, if you look at the response to
8 Interrogatory 8, it is again Exhibit 20, there is no -- they
9 said -- they identified that the reels have to -- that there
10 is a static symbol, and it has to spin on and off the reels,
11 but they didn't say how that is unique from any of the other
12 games, and that goes to several issues.

13 One: It goes to the validity of the patent because
14 some of those games that were out in the market are prior
15 art to precede the filing date of their application, and in
16 particular, the Fire Light Game that Aristocrat itself was
17 selling since 2009 and is the subject of two patents, and
18 the Jaffe patent, which is reflected as the WMS Gaming
19 Games, Willly Wonka was one of several that was shown, those
20 all claim priority to a date before the 2011 application.

21 The existence of multiple games in the market goes
22 not only to the issue of validity of the patent, and we do
23 believe that there were several prior art patents as well as
24 games, including the Berman patent, the Jaffe patent that I
25 mentioned, Ainsworth that would render this obvious to one

1 of ordinary skill in the art. The only such witness that
2 has such an ability in this case so far would appear to be
3 Mr. Marks. They concede in their own complaint at Paragraph
4 25 that Mr. Marks has expertise in this area.

5 By contrast, Mr. Sheikh is not a fact witness, and
6 he is not able to hold himself out as somebody having
7 ordinary skill in the art. In fact, they have not presented
8 any witness competent to do that, so they have not even met
9 the first element to argue a patent case.

10 Contrary to what Mr. Sheikh said in the context of
11 a preliminary injunction motion, the fact that the patent
12 office issued the patent gets no deference. As long as we
13 have raised questions, as we have, and they are unrebutted
14 that this patent would have been obvious to one of ordinary
15 skill in the art as detailed in Mr. Marks' declaration,
16 then --

17 THE COURT: But in determining his likelihood of
18 success on the merits, don't I have to also understand that
19 they start on the merits part of the case, they are going to
20 start with the presumption of validity. So that should play
21 a part in whether or not they have a likelihood of success,
22 right, because the burden is going to be on you to prove
23 invalidity.

24 MR. MOSKIN: Well, ultimately at trial, yes. But
25 in the context of a preliminary injunction motion --

1 THE COURT: In the context of deciding whether they
2 have a likelihood of success on the merits, one of the
3 things I should look at is what is it that they are going to
4 have to prove at trial, right?

5 MR. MOSKIN: Yes.

6 The Titan Tire case against New Holland, which they
7 themselves have cited, we cited additional authority that
8 this point says that as long as a question has been raised
9 as to validity for the purpose of a preliminary injunction
10 motion, the burden shifts back to the patentee. So, again,
11 I --

12 THE COURT: That is true.

13 MR. MOSKIN: -- the -- we have raised substantial
14 questions of validity, and I would concede -- I don't want
15 to muddle the record -- Mr. Sheikh is correct that some of
16 these games were launched more recently, or we don't know
17 the exact dates, but those that we cited for an additional
18 reason, not just to contest validity, but to point out that
19 the plaintiff is unable to show irreparable injury.

20 There are dozens of games out there --

21 THE COURT: Let's make you wear a different hat
22 now. How would you be able to prove damages, if you were
23 the plaintiff in this case, that are quantifiable?

24 MR. MOSKIN: Well, I am not a damages expert. I
25 will say a few things. I want to try to answer your

1 question.

2 First, we have put a number on the social media
3 games. Contrary to what Mr. Sheikh said, Mr. Marks'
4 declaration said that he can identify a million dollars
5 worth of profit from the social media website for these
6 oversized symbol games, which is -- and by contrast,
7 they have not given us any numbers as to their actual sales.

8 In fact, they are in default in responding to
9 discovery in this case to tell us what their sales are, what
10 their profits are, to produce the license agreements with
11 Bally or IGT, that they did say in their objections, that's
12 the only way for them to value -- they know of to value what
13 the significance, the commercial significance of this patent
14 is.

15 So the first answer to your question, I would say
16 to your Honor, take them at face value. Look at -- they
17 said in their answer, I think it's to Document Request 11,
18 that the only way that they know of to value their patents
19 is to look at the license agreements with Bally and IGT.

20 But even though we asked for those in discovery in
21 May, we still haven't seen them, and they have not been
22 offered to your Honor in support of this motion.

23 Another factor, though, that has to be considered,
24 and the Federal Circuit has been making it vastly more
25 difficult for plaintiffs to prove damages and including to

1 prove irreparable injury, we cited to your Honor one of the
2 more notorious or famous cases in the past year, patent
3 cases -- past two years, Apple against Samsung. The
4 District Court in California granted a preliminary
5 injunction on a search feature.

6 The Federal Circuit reversed because Apple failed
7 to show a nexus, and this is something they will ultimately
8 have to do for any damages award, but they also have not
9 even attempted to do for purposes of this motion.

10 There is a nexus between the feature they claim is
11 so important and the sale of the game. So if you were to go
12 to the social media website, Jackpot Dreams, that like
13 Aristocrat and Gimmie Games has had since January, it is
14 nothing new, by the way, and I want to come back to address
15 that, but if you go to that site, you will see there are
16 several games.

17 Since January they have had games with these
18 oversized symbols, and it is going to be their burden to
19 have an expert to say that what drives the sales on the
20 website, on the Facebook site, are these oversized symbols
21 as distinct from, and they're going have to -- it's going to
22 be their burden to show that it is not the Aristocrat itself
23 and trademark, the recognition that that provides, the art
24 content in those games, the other substantive content in the
25 games.

1 The other game mechanics that they have not even
2 addressed, there are -- again, I am not an expert nor is Mr.
3 Sheikh, nor have they offered at this point any damages
4 expert to show how they would meet their burden of proving
5 damages at trial, much less to show that they are suffering
6 any harm now, and, again, partly because there are dozens of
7 other games, and even though there may be some modest
8 distinction between a game with an oversized symbol in the
9 middle reel as opposed to a side reel, it's going to be
10 their burden to show as a matter of damages that being
11 positioned in the middle reel is something that consumers
12 care about and would drive traffic to their games as opposed
13 to any of these dozens of other games, including the
14 Aristocrat's own prior Fire Light game that predated their
15 own game.

16 I would refer your Honor to I think it's Paragraph
17 2 of Mr. Marks' declaration, where he explains how the game
18 mechanics of the Aristocrat Fire Light game, which preceded
19 as a matter of prior art dating back to 2009, it's the
20 identical game mechanics. Even though the symbols appear in
21 four symbol positions, they have a patent on cloning of
22 reels, so, again, which predates the High 5 patent. As a
23 matter of validity, if you look at Paragraph 2, I believe
24 it's of Mr. Marks' declaration, he explains the game
25 mechanics show that it's the same game mechanics that are at

1 work now in the accused games with oversized symbols.

2 I don't know if that sufficiently answers your
3 question, but frankly, I would rather I think to raise
4 questions and ultimately an expert will have to answer. Mr.
5 Sheikh is not an expert. I am not an economics or damages
6 expert. They have not offered a damages or economic expert.

7 The only form of harm they pointed to would be two
8 things. One is sort of a trademark type of harm. There is
9 no trademark claim in this case. They have not shown any
10 reason to think that -- particularly given the dozens of
11 other games out there that people are going to associate an
12 Aristocrat website with them, although they argue in their
13 papers that they may suffered a loss of market share, and I
14 think Mr. Sheikh hinted at that in saying, you know, that
15 the market may overtake them, and they will lose their
16 market share in the meantime.

17 The Millipore Corp. Case in this district, which we
18 cited, Millipore against W.L. Gore, says loss of market
19 share as a matter of law is not a sufficient basis for a
20 preliminary injunction. That is something that can be
21 compensated with damages at the end of the trial.

22 I do really want to focus on what I think is one of
23 the really basic flaws in the argument here is that going
24 back to the point I made earlier that the trade secret for
25 oversized symbols is identical to the patent for oversized

1 symbols.

2 Your Honor asked the question, and I don't believe
3 Mr. Sheikh answered it, well, why didn't they sue in
4 September, a year ago, when they saw at this G2E conference
5 that Aristocrat and Gimmie Games were selling the games that
6 are now accused of patent infringement.

7 We don't know why not.

8 THE COURT: Well, they couldn't have sued you for
9 patent infringement at the time because they didn't have a
10 patent, but they could have sued, I suppose, for a
11 misappropriation of trade secrets --

12 MR. MOSKIN: Exactly right, but they didn't.

13 In fact, most of Mr. Sheikh's arguments at the last
14 part of his arguments to your Honor was an allegation, which
15 he admitted was unfounded that simply because Dan Marks had
16 once worked at High 5 Games, that he should be suspected of
17 having stolen of trade secrets.

18 In fact, he left in 2010, a year before these games
19 were developed. And what he did not say, the key elements
20 of Mr. Masci's and Mr. Kavanagh's declarations were that by
21 the time they got to Gimmie Games in 2012 or 2013, the game
22 mechanics of these accused games were already complete.
23 They had nothing to do with the development of these games,
24 even if as artists they had access, and you know, we don't
25 need to argue that point, I think one of them at least did

1 say, he did know they were developing these games, but he
2 was simply an artist.

3 But the more important point, which is unrebutted,
4 is that by the time they got to work at the defendant,
5 Gimmie Games, the game mechanics were already complete, so
6 they had no input into the accused games, but that would go
7 to the trade secret claim, for which they have not sought a
8 preliminary injunction.

9 So there is no reason we are aware of why they
10 could not have sought a preliminary junction back in
11 September. It's the identical facts that they get.

12 If you look at the Answer to Interrogatory 8, and
13 in their complaint itself, I think it is Paragraphs 24 and
14 25, they concede that the trade secret for Super Symbols is
15 identical to the patent for Super Symbols, and to then shift
16 to the distribution on social media, now that began in
17 January of 2000. The fact there was a notice --

18 THE COURT: In "January of 2000"?

19 MR. MOSKIN: -- excuse me. 2014, 2014, so it has
20 been -- I apologize --it's been, so ten months --

21 THE COURT: Would you agree with their assertion
22 that once you begin to market your game and make it
23 available via the social media, that the ability to quantify
24 damages becomes more difficult?

25 MR. MOSKIN: Well, we've put a number on the sales,

1 a million dollars from social media. It is in Mr. Marks'
2 declaration. By contrast, they have not told us how at all,
3 if they have been harmed.

4 So we have given your Honor specific numbers.
5 We've told your Honor, it's filed under seal, but we told
6 your Honor they sold roughly \$15 million of the machines,
7 the physical machines, and have made about a million dollars
8 in sales on social media. You can very easily --

9 THE COURT: What about their argument that once the
10 people come in to play that game, and they are in your
11 social casino or virtual casino, they can go to other places
12 to play, and there is no way to quantify the profit you made
13 by luring what they claim is their people to your site?

14 MR. MOSKIN: Well, they would need a damages expert
15 to say there is a theory under patent law, convoyed sales.
16 They have not even made that argument here, and again, they
17 have not offered any damages expert in support of this
18 motion.

19 But the fact that the contrary to what Mr. Sheikh
20 was suggesting, these games of oversized symbols, as
21 testified to in the declaration by Mr. Marks, they were on
22 the website in January. Not only were they on the website,
23 but Mr. Fallon and a total of 11 people from the plaintiff's
24 company visited the website before -- long before they say
25 in the Nadooshan declaration in Paragraph 20, that the

1 company first learned about this website a week before they
2 filed the motion.

3 Exhibits 1 and 2 to our reply papers supported by
4 the declaration of Andrew Gracie, who is the web master
5 effectively of the Facebook site, it's unrebutted. They had
6 almost a dozen people from January through July who --

7 THE COURT: Visited the website?

8 MR. MOSKIN: Excuse me?

9 THE COURT: Visited the website?

10 MR. MOSKIN: Visited the Jackpot Dreams website and
11 they have not explained why they have not moved sooner.

12 Even a more fundamental question, besides the
13 arguable issues of candor with the Court, they have not even
14 attempted to show how the social media website is
15 infringing.

16 As your Honor knows, there is a pending motion to
17 dismiss the amended complaint. One of the grounds there is
18 they have not even properly alleged contributory
19 infringement on the social media website. The analysis of
20 infringement is fundamentally different.

21 One of the things just to put it in very obvious,
22 just terms or clear terms, one of the elements or
23 limitations of the subject patent is that the symbols have
24 to rotate on and off of a display device. On Facebook, that
25 display device is going to be the personal computer.

1 Presumably it is not a defined term, which we have
2 objections to as well, but it's either going to be a
3 personal computer, a cell phone, a smart phone or something
4 of the sort of the individual user.

5 There's not even an allegation or an attempt in
6 this motion how the fact that individuals may be going to
7 Facebook and on their own display devices playing these
8 games are -- that would be an argument for induced
9 infringement. It's not even into that how they could show
10 that, and we have a pending motion to dismiss the complaint
11 that it, too, fails to lay out any grounds to allege that
12 Aristocrat or Gimmie Games had sufficient control over what
13 the individuals do or have actively induced them, all
14 elements -- required elements of making a claim, not even
15 supported -- not even mentioned anywhere in their own
16 motion.

17 So if the argument is that the land based games,
18 the physical slot machines infringe, that is a motion for
19 preliminary injunction that could have been made last
20 September.

21 If it's an argument that the social media website
22 is infringing, that is an argument that could have been
23 made, and they had actual knowledge in January of 2014, not
24 2000, and they have not addressed it. They have not even
25 raised the argument. So there is -- again, if that is the

1 heart of their argument, your Honor has no basis even to
2 consider an injunction.

3 The delay factor, as your Honor noted, in one of
4 your own decisions, Ultimate Trading against Daus, it is the
5 immediacy, and there's no explanation of what the immediacy
6 of the harm is, or if indeed they are suffering any harm.

7 Again, they have not given this Court any
8 information at all to support a claim that they have lost a
9 penny as a result of the launch of these games, not that
10 economic harm would be itself a basis for an injunction.

11 Instead what Mr. Nadooshan says in his declaration
12 to support a showing of irreparable harm is, and I think
13 it's Paragraph 24 of his declaration, that he says that the
14 way you get customers on social media is when you launch a
15 new game and that creates some sort of excitement, and so
16 that the time when you get those new customers is at the
17 time of the launch of a new game.

18 Based on his own declaration, his own -- even
19 though he's not an economics expert and --

20 THE COURT: You are saying the damages occurred
21 then?

22 MR. MOSKIN: Any harm would have occurred back in
23 January when they launched the site. So on their own, I
24 think -- I don't want to be too cute about it, but he said
25 there's some hoist on their own petard, his own arguments,

1 and they have not been supplemented by the arguments of a
2 qualified economics expert.

3 I do want to mention a couple of other things about
4 the likelihood of success on the merits. We've identified
5 several claim terms that we think are ambiguous. I won't go
6 through all of them, because I don't think it's -- it may
7 not be -- I will, if you wish, but just the two that we
8 focused on as going to the question of infringement, of
9 direct infringement as opposed to the induced infringement,
10 I mean, they apply to both, but the argument of direct
11 infringement that the slot machine games that have been on
12 sale for over a year now infringe.

13 Mr. Sheikh pointed to the fact that the patent
14 language requires that there be a static oversized symbol.
15 That term is not defined by Mr. Ballone, who by the way
16 himself --

17 THE COURT: Which term, static oversized symbol?

18 MR. MOSKIN: Static oversized symbol.

19 Mr. Ballone, the only thing he said in his
20 declaration, he said, your Honor, you should look to the
21 ordinary language meaning of these terms.

22 "Static," as I understand the term, is that it
23 doesn't move. As you can see from those videos, which by
24 the way, those videos themselves are not part of the record
25 on this motion, so we have a concern about that.

1 Those symbols in all of those games were moving, so
2 the most obvious definition of static means not moving.
3 they all move.

4 Mr. Sheikh is free to argue that in the context of
5 the patent, something else was meant, but I would point out
6 that if you look at the specification of the patent, it
7 doesn't purport to define "static" in any way other than the
8 ordinary English language.

9 Also the plurality of symbols and a plurality
10 symbol positions, it is another key element of the patent
11 that we've focused on as a clear way in which we do not
12 infringe and can't be alleged to have infringed.

13 In the static symbols, the Exhibit C to Mr. Ballone's
14 declaration, he has reproduced screen shots of one
15 of the accused games. You can see in every one of those
16 screen shots, there is only one symbol, at most one symbol
17 at each of the symbol positions.

18 The patent has to be read on its face in context,
19 not by reference to some other patents, which also were not
20 in the record that Mr. Marks may have obtained that also
21 used the term "reel." You have to look at the patent itself
22 and construe it. If they wanted to, they could have been
23 their own, as the law says, they could have been their own
24 lexicographers in putting a different definition, but they
25 didn't. So a plurality of symbol position -- symbols at a

1 plurality of symbol positions means that there has to be
2 more than one symbol at each -- at at least one symbol
3 position, and there are none in this game.

4 These are arguments that may ultimately be
5 elucidated by --

6 THE COURT: When you say there are none in this
7 game --

8 MR. MOSKIN: In the accused game.

9 THE COURT: In your games.

10 MR. MOSKIN: Yes, in the defendants' games.

11 THE COURT: Okay. Anything else?

12 MR. MOSKIN: Just to wrap up, to say, you know, the
13 balancing of the harm, we have actually told your Honor that
14 we have made about \$16 million -- at least \$16 million in
15 sales, and that would be a direct injury to us to have to
16 suspend sales.

17 We have pending orders and things that would have
18 to be stopped. By contrast, the plaintiff has told you how
19 much they have sold, if there has been any diminution in
20 sales since these games launched a year ago or 10 months ago
21 on Facebook. If you are weighing, you know, the scales of
22 justice as it were, we have given you at least a number.
23 We could give you more. They've given --

24 THE COURT: How about their argument it is hard to
25 quantify it?

1 MR. MOSKIN: But it's their burden, and I think if
2 you look at the Apple Samsung case --

3 THE COURT: But that is their burden, and
4 ultimately it is going to be their burden at the trial.

5 But the question is now for the preliminary
6 injunction, Judge, if you let them continue to make these
7 sales, we're not going to be able to quantify a lot of those
8 sales. We will be able to quantify some, but the rest of it
9 is not going to be compensable in monetary damages?

10 MR. MOSKIN: Well, again, there's no claim in this
11 case for injury to reputation, which is what they've said.

12 The other thing they argued in their brief is that
13 there is a loss of market share.

14 The Millipore case says that is not a ground for
15 preliminary injunction --

16 THE COURT: I am aware of the Millipore case.

17 MR. MOSKIN: -- and ultimately -- look, this is
18 just a preliminary injunction motion. The case will
19 continue no doubt, and if they want to get a damages expert
20 to explain either that he can't quantify, they should have
21 put that in as well. If they thought it was so difficult,
22 put it in an expert declaration. Mr. Nadooshan is not
23 qualified to opine on the difficulty or not.

24 We have given you an actual number of a million
25 dollars in sales on Facebook and \$15 million on sales --

1 they haven't met their burden --

2 THE COURT: Well, that question is for him, not for
3 you, because the question is whether legally in a
4 preliminary injunction is the standard difficulty in
5 quantifying or inability to quantify. It is two different
6 things.

7 MR. MOSKIN: Yes. They are different, and I don't
8 honestly know the answer to that, but I don't think they
9 have met either.

10 Thank you.

11 THE COURT: Thank you.

12 Counsel?

13 MR. SHEIKH: Your Honor, just a few, and I
14 apologize for my throat.

15 THE COURT: No problem. Please, we have water,
16 feel free.

17 Counsel, should I look at the fact that your
18 ability to quantify these damages may be difficult versus
19 but that you are still able to do it?

20 What do you think is the appropriate standard?

21 Is it difficulty in quantifying damages or
22 inability to quantify damages in a way that would be
23 compensable monetarily?

24 MR. SHEIKH: Well, I don't know the answer to that,
25 your Honor, but what I would say --

1 THE COURT: Becasue I thought the standard was
2 incapable of being -- do you want some water? We can give
3 you water.

4 MR. SHEIKH: I think I should be okay in about five
5 seconds.

6 THE COURT: Okay.

7 MR. SHEIKH: I think the standard that your Honor
8 should look at is a difficulty in quantifying damages at
9 this point.

10 You know, right now, it is very difficult to
11 quantify the damages as defendants themselves say that, you
12 know, indicating the nexus between the number of users that
13 come in and the actual damages that may occur because of
14 these users playing games is very difficult, so injunctive
15 is the key remedy for exactly the point that your Honor
16 raised is to the extent that they are deploying these
17 infringing games on to the Jackpot Dreams casino site, if
18 there is no relief granted at this point, they will continue
19 to do so whether it's difficulty --

20 THE COURT: It is going to be your burden to
21 establish a nexus between what you allege is the patented
22 feature of your game and your loss in sales, right?

23 MR. SHEIKH: That's right, your Honor.

24 But at this point, at this point right now,
25 because -- because we are on a preliminary injunction

1 application, and that may come out during expert testimony
2 at some later date, where we can see whether it's an
3 inability or a difficulty to connect those dots, you know.
4 When defendants are talking about discovery, you know, one
5 thing to keep in mind is there has been no discovery
6 exchanged on either side here, and I can get into the
7 reasons why, but it's certainly not because we refused to
8 answer questions.

9 With respect to the actual interrogatory response
10 that they are citing about, they asked for responses to what
11 competitive advantage, you know, these other games -- that
12 our games had with these other games that are in the
13 marketplace. You know, one of the things that I wanted to
14 make clear for your Honor, as Mr. Moskin said, that was a
15 trade secret misappropriation question. But even further
16 and separate and apart from that, the idea of competitive
17 advantage is not relevant under the New Jersey's Trade
18 Secrets Act.

19 It is a completely different standard and it goes
20 to economic impact instead of competitive advantage, and so
21 when they asked the question in a certain way, it has no
22 relevancy to the outcome of this case, you know, we are
23 going to provide an answer that is appropriate for that.

24 What we did is we actually did provide an answer,
25 that the games that have been cited by defendants do not

1 include the unique fact features that were indicated in our
2 '223 patent application or -- or that we indicated as unique
3 in our trade secret description. That's what we did. That
4 is the information that we have, and that is the information
5 we provided for that time.

6 One of the questions -- one of the issues that Mr.
7 Moskin raised is all they have to do is raise a question,
8 and as the Court knows, they have to raise a substantial
9 question with respect to the likelihood of, you know, the
10 validity of the patent, and I don't think they have done
11 that here.

12 If you look at the games and the prior patents that
13 they've cited, again, none of them embody the actual
14 embodiments of the '223 patent, and none of them were
15 analogous to the actual ways that Super Symbols and/or Mega
16 Symbols are actually played in this case.

17 Going to the issue of Jackpot Dreams and when the
18 games were launched, conspicuously absent from defendants'
19 own papers were when were these Mega Symbols games then
20 launched.

21 The only thing that we have, your Honor, is the
22 website -- Gimmie's own website indicates that those games
23 were launched on June 20 of 2014. We have no evidence at
24 all indicating, okay, well, if it wasn't June 20, 2014, when
25 was it?

1 And what specifically can they point to with
2 respect to High 5 being actually aware of those games on the
3 website prior to early August of 2014?

4 They made a great little chart as to when potential
5 users logged in to Jackpot Dreams, but just because the
6 users log into Jackpot Dreams through their Facebook account
7 doesn't mean that they're aware or even saw Mega Symbols
8 games are actually deployed on the Jackpot Dreams casino.

9 So their whole argument about, you know, this --
10 this -- this application could have been brought in January
11 of 2014, we were not aware of that deployment of those games
12 in January of 2014, and we became aware of them in early
13 August 2014.

14 THE COURT: You mean deployment in the social
15 media?

16 MR. SHEIKH: Deployment in the social media.

17 With respect to September 2013, we did sue Gimmie
18 Games and the individual defendants for trade secret
19 misappropriation.

20 At the time of September, what was going to be our
21 theory against Aristocrat?

22 We had no evidence that they were actually
23 misappropriating our trade secrets. They had purchased
24 games from Gimmie Games. They had marketed these games to
25 users of the G2E Show, but to our knowledge, the only

1 misappropriation theory was against the individual
2 defendants, the Gimmie Games, and that is why the focus of
3 the lawsuit that was filed in October was against Gimmie
4 Games and the individual defendants.

5 Just a couple of other points, your Honor.

6 Mr. Ballone does talk about the definition of
7 static in his declaration. It specifically is listed in
8 Paragraph 12 of his declaration, where he talks about --

9 THE COURT: Well, let me go back to something else.

10 MR. SHEIKH: Sure.

11 THE COURT: If the launching of the site is what
12 creates the damages, as is indicated in one of the
13 certifications, and the launching occurred a while ago, what
14 is the immediate irreparable harm then?

15 MR. SHEIKH: It is not the launching of the site,
16 your Honor. Jackpot -- I mean, through this application, we
17 are not seeking to enjoin Jackpot Dreams.

18 As Mr. Marks said in the application, there are
19 other games that are being played on Jackpot Dreams, the
20 social casino site. There have been games that have been
21 added to Jackpot Dreams since January of 2014.

22 What we are here to seek is an application to
23 enjoin the Mega Symbols games being played at Jackpot
24 Dreams.

25 Now, again, the first that we became aware of that

1 was August 2014. There has been no evidence put before the
2 Court that these actual games were deployed prior to June
3 20, 2014 when Gimmie Games put out a press release
4 indicating the fact they were on this Facebook website.

5 A couple of other points, your Honor, that I would
6 like to make.

7 Ocean's Glory, which was the first Super Symbols
8 game that was created by High 5 was actually created by Joe
9 Masci. So, again, the fact that he is just a developer,
10 he's just an artist, he's just a creative person, that
11 doesn't hold true given the fact that he's a co-inventor to
12 previous applications --

13 THE COURT: But according to the defendants, the
14 games you are claiming about already existed by the time you
15 got there, right?

16 MR. SHEIKH: Well, they don't say -- see, they are
17 very careful. They don't talk about the games actually
18 existing. They actually don't even say the same thing.

19 If you look at Joe Masci's and Brian Kavanagh's
20 certifications, and I forget which one, your Honor, but one
21 of them talks about the math model existing prior to them
22 being there, and the other one does not.

23 One of them talks about the game play mechanic for
24 Storm Queen's games, but it is unclear whether that game
25 play mechanic is actually the same exact one we're talking

1 about today. There may have been a game play mechanic that
2 existed at that time. We have no way of knowing. Given
3 their short certifications, and given the fact that they are
4 not saying exactly the same thing, and they are not even
5 talking specifically the same way about the mathematical
6 model existing, you know, I respectfully submit that the
7 Court should give little weight to their certifications.

8 THE COURT: Isn't it your burden to come forward
9 with the Court and say, at the time they got there, none of
10 this existed, and they're the ones that created it, and it
11 is your burden, not theirs to prove the negative, right?

12 MR. SHEIKH: Well, that's absolutely correct, your
13 Honor, and through discovery in this case what we hope to
14 show is exactly that, that they were -- we know that they
15 had access to this information at High 5 games.

16 We know that they took this information -- we know
17 they had access to this information at High 5 Games. We
18 know Joe Masci was more technically savvy in understanding
19 about these games from mechanics than he is letting on in
20 his certification, and one of the things that we will be
21 trying to see in discovery is when did these game play
22 mechanics actually get created and by whom, and in what way,
23 and how were they changed over time.

24 Now, one thing, your Honor, is the G2E Conference
25 was held in Las Vegas this week --

1 THE COURT: This week?

2 MR. SHEIKH: -- this week, and it ended yesterday.

3 There were some indications that High 5's
4 reputation is suffering in the marketplace.

5 Mr. Fallon was there, and he is happy to talk about
6 what specifically he learned there from distributors
7 actually saying things to High 5 Games with respect to their
8 reputation, but that is one element in this case. It's not
9 just market share. We are talking about the reputation of
10 High 5.

11 Again, High 5 has a reputation creating unique
12 inventive games. To the extent that there are games that
13 are knocking off the features of High 5 Games and are
14 directly infringing on a patent that High 5 has received
15 from one of its games, its reputation is suffering.

16 Would you like to hear from Mr. Fallon, your Honor?

17 THE COURT: Counsel, the problem is this is new.

18 MR. SHEIKH: This is new, your Honor.

19 THE COURT: This is not in your papers. I am not
20 going to hear about that today. It is not fair to the
21 defendants --

22 MR. SHEIKH: Very good.

23 THE COURT: -- when you start bringing it in. They
24 could have done their own investigation and bring in their
25 own witnesses, so that is not fair.

1 Anything else that you wanted to respond to?

2 MR. SHEIKH: No, your Honor.

3 To the extent -- to the extent the Court has any
4 other further questions, I am happy to answer them.

5 Also to the extent that the Court believes that
6 further briefing is necessary, we are open to that idea as
7 well.

8 If there are specific issues that have been raised,
9 again, because we didn't have the opportunity to reply, and
10 I am not saying that it was anything but, you know, some of
11 these arguments were raised as a direct result of seeing
12 defendants' opposition papers, but I throw that out to your
13 Honor in case there is further briefing that is necessary or
14 desired in this matter.

15 THE COURT: If after considering the arguments
16 today, I decide that there is any specific issue that needs
17 to be fleshed out more, I will give you both an opportunity
18 to respond, so let me address it that way.

19 What do you say about their argument that there is
20 no real expert report before this Court on the issue of the
21 damages not being quantifiable, that what we have is the
22 certification of your guy, which is not sufficient as to the
23 damages issue?

24 MR. SHEIKH: Well, Mr. Nadooshan is certainly not
25 being offered as an independent expert. But I mean, he has

1 been involved in the industry for, you know, I don't know
2 how many years, but, you know, close to two decades. He's
3 aware of the types of damages that can and will occur as
4 these users are being driven into Jackpot Dreams to play
5 these Mega Symbols games.

6 So I would offer, your Honor, that, you know, Mr.
7 Nadooshan's declaration offers exactly the kind of
8 testimony, factual testimony, that is required with respect
9 to what is happening in the marketplace right now, what is
10 happening once a game gets deployed and how users behave to
11 that market. In fact, that is exactly the kind of analysis
12 that High 5 Games -- Mr. Nadooshan uses the High 5 Games
13 when they are making business decisions exactly because they
14 understand user behavior and exactly because they understand
15 how the revenue metrics work once these users get into the
16 social casinos.

17 THE COURT: Okay. All right.

18 Anything else?

19 MR. SHEIKH: No, your Honor.

20 THE COURT: Anything else from the defense?

21 MR. MOSKIN: Just very briefly.

22 If there is any ambiguity in Mr. Marks' declaration
23 that these oversized symbol games were on the website in
24 January, we will be happy to clarify. I am quite certain
25 that they were, and I think his declaration says that.

1 I think also if you look at Mr. Kavanagh's and Mr.
2 Masci's declarations, they also said they used different
3 words, but the meaning I think was fairly clear.

4 Also, as to the last issue your Honor raised, the
5 Third Circuit very recently in the Ferring Pharmaceutical
6 case said that it is sort of reputational injury itself, if
7 not quantified, is not a basis for a preliminary injunction
8 motion, so it said in a Lanham Act case, which this is not
9 even a Lanham Act case, where there is an argument that
10 there is a damage to reputation, you have to quantify it.
11 You can't just have somebody, an interested witness say, you
12 know, we are suffering some harm.

13 Thank you.

14 THE COURT: All right.

15 Counsel, I am going to take a look at the arguments
16 from today, digest it a little bit, and take another look at
17 your briefs before I render a decision on this.

18 Certainly it is too important to both of you for me
19 to rule from the bench right now, which originally I
20 intended to do, but I have to give it some thought now.

21 MR. SHEIKH: Your Honor, if I may, one point with
22 respect to the quantum of damages.

23 THE COURT: Go ahead.

24 MR. SHEIKH: In Mr. Marks' declaration, they do
25 throw out the one-million-dollar number. It is unclear from

1 the declaration itself whether that specifically tied to
2 Mega Symbols games and Jackpot Dreams' revenue.

3 It is also unclear from Mr. Marks' declaration
4 whether that's Gimmie Games' revenue, whether that's Jackpot
5 Dreams' revenue, whether that's Aristocrat's revenue, so
6 that \$1 million by itself, I would say to your Honor is not
7 a quantification of damages because as your Honor pointed
8 out to Mr. Moskin, you know, the fact that these users are
9 being then sent to play other games and can play other
10 games, it is unclear what that \$1 million is specifically
11 talking about when they say sales. It may not be Gimmie's.
12 It may not be Aristocrat's. It may not be anything. It is
13 really unclear as to what quantification of damages that \$1
14 million is supposed to represent, and I apologize. That's
15 the only point I wanted to make for your Honor before I --

16 THE COURT: There's no need to apologize.

17 So let me take a look at this. Let me think about
18 it. I may want some clarification on an issue or two, but
19 let me go over it in more detail, and then I will get back
20 to you, okay?

21 MR. SHEIKH: Okay, your Honor.

22 THE COURT: It is possible that I don't need
23 further argument now.

24 The opposition to the motion to dismiss has not yet
25 been filed?

1 MR. SHEIKH: That's correct, your Honor. It is due
2 on Monday.

3 THE COURT: Okay. I will take a look at that as
4 well. Maybe I can decide both motions at the same time.

5 Thank you.

6 MR. SHEIKH: Thank you, your Honor.

7 MR. MOSKIN: Thank you, your Honor.

8 (Court adjourned.)
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